

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28009
Y/prt

_____AD3d_____

Argued - March 18, 2010

WILLIAM F. MASTRO, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
CHERYL E. CHAMBERS, JJ.

2009-10595

DECISION & ORDER

Ray Haber, et al., respondents, v Betty Cohen, et al.,
appellants (and a third-party action).

(Index No. 1033/05)

Weg and Myers, P.C., New York, N.Y. (Dennis D'Antonio, Joshua L. Mallin, and Jonathan C. Corbett of counsel), for appellants.

Seyfarth Shaw, LLP, New York, N.Y. (Richard M. Resnik and Eddy Salcedo of counsel), for respondents.

In an action, inter alia, to recover damages for negligence and trespass, the defendants appeal from so much of an order of the Supreme Court, Kings County (Kurtz, J.), dated October 21, 2009, as granted the plaintiffs' motion to strike their demand for a trial by jury.

ORDERED that the order is affirmed insofar as appealed from, with costs.

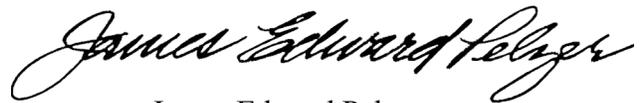
The facts of this case are set forth in the companion appeal (*see Haber v Cohen*, _____AD3d_____ [Appellate Division Docket No. 2009-07508; decided herewith]).

The Supreme Court properly determined that the defendants waived their right to a trial by jury by including counterclaims for equitable relief along with their counterclaims for legal relief (*see Herbil Holding Co. v Mitrany*, 11 AD3d 430; *City of New York v Philips*, 272 AD2d 568; *Whipple v Trail Props.*, 261 AD2d 470; *Adelstein v City of New York*, 212 AD2d 748; *cf. Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 481).

Contrary to the defendants' contention, the amendment of their counterclaims to withdraw their requests for equitable relief did not revive their right to a trial by jury (*see Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d at 482; *Whipple v Trail Props.*, 261 AD2d at 470; *cf. Giammalvo v 2170-2178 Broadway*, 293 AD2d 390; *Mirasola v Gilman*, 104 AD2d 932, 932).

MASTRO, J.P., DICKERSON, BELEN and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court